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No. 80-518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., *et al.*, *Petitioners,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *et al.*, *Respondents.*

On Writ Of Certiorari To
The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RALPH RILEY, RESPONDENT

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This brief of the Petitioners (collectively "U.S. Industries") replies to the brief of the Respondent, Ralph Riley.

ARGUMENT

I. Respondent Misinterprets the Term "Arising Out of and in the Course of Employment" by Asserting that Injury Should be Defined to be "Employment-Relatedness."

Respondent's brief, beginning at page 8, urges this Court to define "injury" under the Act to mean "employment-relatedness" rather than "arising out of and in the course of employment," 33 U.S.C. § 902(2). In support of this interpretation, Respondent cites 1, Larson, *The Law of Workmen's Compensation*, §§ 6 and 6.10.

These sections of Larson both deal only with interpretation of the phrase "arising out of the employment." Respondent's brief at page 21 admits that he did not claim that the injury suffered by Riley was an "occupational disease." Having admitted this fact, Respondent cannot argue that the statutory language requires only "employment-relatedness" when the applicable statute clearly reads "accidental injury arising out of *and* in the course of employment" (emphasis supplied). Petitioners assert that if Congress had intended the definition of injury to be "employment-relatedness" that the statute would state this as the "definition" of injury, rather than its present language. However, Larson also recognizes a "course of employment requirement test." 1, Larson, *The Law of Workmen's Compensation*, §14. Larson therein notes that correct interpretation of the provision "arising out of and in the course of employment" requires not only that injury "arise out of employment," but also arise "in the course of the employment." This phrase requires work connection as to time, place and activity and "demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment." 1, Larson, §14, p. 4-1.

In addition to admitting that Respondent made no claim for occupational disease, Respondent's brief at page 22 admits that he made no claim before the Administrative Law Judge on a "work-relatedness theory." Respondent's brief at page 19 also does not challenge the correctness of the Administrative Law Judge's finding that no accident happened on November 19, 1975. Thus, there is no dispute between the parties before this Court concerning the existence of substantial evidence of record for the finding of the Administrative Law Judge. Respondent's brief instead focuses upon an incorrect

definition of injury to urge this Court to affirm the lower court. Respondent has cited no cases under the Act nor its legislative history to persuade this Court that "employment-relatedness" should be a definition of injury under this Act, or was intended to be a definition of injury under this Act at the time of its passage. Petitioners assert that liberal construction of the Act does not compel affirmance of the finding of the lower court herein, where plain statutory terms have been ignored.

II. The Statutory Presumption Does Not Apply Until the Employee Has Produced Facts to Prove an "Accidental Injury Arising Out of and in the Course of His Employment."

1. Respondent would have this Court declare that the statutory presumption is a presumption of law rather than fact. Respondent asserts on page 9 of his brief that no basis in law exists for Petitioners' assertion that 33 U.S.C. § 920(a) applies only to the "arising out of" requirement in cases where the claimant has already established that the injury occurred "in the course of employment." However, Respondent cites no authority rebutting or distinguishing the Petitioners' assertion. Petitioners in their previous Reply Brief to the Federal Respondent, cited numerous cases applying the presumption in this manner, and the lower court herein noted that in cases where there has been no question with respect to the existence of an injury "in the course of employment," the Act "has been consistently interpreted to require that the injury be presumed to be causally related and to have arisen 'out of' employment as well." (Pet. App. 8a).

Petitioners' brief does not challenge the applicability of the presumption once the claimant has shown that an accidental injury occurred in the course of his employ-

ment.[1] However, Petitioners question the applicability of the presumption to make this "injury," found by the lower court to occur at 2:30 a.m. at home, to be presumed to be related to earlier employment with this employer. The New York decisions cited by the Respondent in his brief on pages 10-11 do not support a contrary view than this. In each of the cited cases the worker was engaged in work at the time of injury of benefit to the employer or on the employer's premises. As such, they were in the course of their employment. If the presumption was applied at all, it applied to make the employee's injury or death compensable, due to employment-related risk occurring at or near the site of employment.

Respondent's brief on pages 12-13 cites Congressional testimony of V. M. Braxton in support of Respondent's interpretation of the operation of presumption. However, it should be noted that his description of the presumption's application was in connection with an occupational disease rather than a traumatic injury or aggravation. The statutory definition of occupational disease does not require that the disease arise out of and in the course of employment, but only "arises out of" the employment. 33 U.S.C. 902(2). In the cited example, once the claimant's injury was shown to have been due to exposure aboard ship, then it was Mr. Braxton's assumption that a causal relationship would be presumed.

Respondent at page 17 of his brief suggests that the burden of coming forth with "substantial evidence" negating the compensability of the claim is on the employer

[1] Petitioners embrace the position of the Amicus regarding this Court's prior interpretation of the presumption while noting that many Circuits, including the D.C. Circuit, have presumed injury to "arise out of" employment when occurring "in the course of" that employment.

at the outset. In reply, Petitioners state that the practice of requiring the claimant to proceed first is because the claimant has the burden of proof to establish that a work incident occurred which could have resulted in his injury. These initial allegations are the very basis of his claim and constitute his *prima facie* case. Petitioners assert that this burden of proof does not place an onerous burden upon the claimant, and by requiring claimant to prove these elements, permits the employer to investigate the circumstances of claimant's alleged injuries. These issues are issues on which the claimant is more capable of producing evidence than the employer and are more properly litigated without the benefit of the presumption.

Respondent on page 19 asserts that Petitioners presented no evidence to show that the arthritic condition was unrelated to Riley's work; however, no claim was previously made by the Respondent that it was related, and therefore no evidence was required to be produced in that regard. In support of this argument, the Respondent on page 20 argues, without support in the record, that overhead work puts a strain on the neck and that 32 years of such work "might" result in the development of cervical arthritis.[2] After arguing this alleged "potential connection," then Respondent on page 20 cites the *"possibility"* of such a condition related to employment. However, contrary to Respondent's brief on page 21, none of the medical witnesses testified that Riley's work duties *per se* aggravated his condition. To the contrary, each doctor was asked to base his opinion on whether or not the incident at work on November 19, 1975 "aggravated" Respondent's pre-existing arthritic condition. (J.A. 129, 162). Even the lower court's remand requires

[2] It might also be argued however that normal "wear and tear" and age might cause such a condition.

the Administrative Law Judge to make a further fact finding on this issue (Pet. App. 11a), rather than make such a presumption upon this record.

Petitioners assert that the Respondent's interpretation of the operational effect of the presumption from his reading of the decisions in *Swinton* v. *J. Frank Kelly, Inc.*, 554 F.2d 1075, *cert. denied* 429 U.S. 820 (1976) and *Wheatley* v. *Adler*, 407 F.2d 307, 313 (1968), is incorrect and places too stringent a burden on the employer for presenting proof to rebut the presumption. Under the lower court's ruling it would be impossible for an employer to rebut an inadequately detailed claim, since the employer would have to prove that nothing in the employment could possibly have caused claimant's injury. Only when claimant has met his dual burden of establishing that he has suffered harm and that the alleged accident in fact occurred in the course of his employment, does the Section 20(a) presumption of causal connection (that the harm was caused by the accident) apply. The presumption then operates to link the harm with the injured employee's employment.

2. Respondent in his brief on pages 21-22 asserts that 33 U.S.C. § 922 would permit him to reopen his case and present new evidence. The statute provides as follows:

> MODIFICATION OF AWARDS
>
> SEC. 22. Upon his own intiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim review a compensation case in

> accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

Respondent has never previously argued the applicability of Section 922 in any brief filed by him before the Benefits Review Board, or the lower court. This statutory provision should not now be an issue in this case. *Parker* v. *Motor Boat Sales,* 314 U.S. 324 (1941). Respondent's admission on page 22 that he did not rely on a "work-relatedness" theory does not support his assertion on page 21 that the Administrative Law Judge was "mistaken" in his determination that Riley's condition was not an "injury" within 33 U.S.C. 902(2). Further, the record is not "replete" with evidence dispositive of the connection between the claimant's injury and the nature of his employment, as asserted on page 22 of Respondent's brief. In fact, with the acceptance of the Administrative Law Judge's findings of fact by the lower court and by the Respondent herein, the only evidence which now remains concerning an "injury" is the lower court's finding it occurred at 2:30 a.m. on November 20, when he awoke in pain and was hospitalized. (Pet. App. 7a). No evidence of "potential connection" between this

hospitalization and employment is suggested by the circumstances of this case. This is the reason why the lower court in remanding could not anticipate what further findings would be. (Pet. App. 11a).

CONCLUSION

Respondent in his brief on page 17 correctly states that 33 U.S.C. 920(a) does not by its terms state what showing must be made by a compensation claimant in order to give rise to the presumption. The lower court found that the hospitalization of Respondent during the early morning hours of November 20, 1975 was an "injury" under the Act and gave rise to the operation of presumption. (Pet. App. 8a). Under the lower court's interpretation, the presumption is a "statutory presumption of compensability" (Pet. App. 9a). In rebuttal, Petitioners assert that the threshold question before the presumption can apply is whether or not the injured party has sustained "injury" within the meaning of the Act. Such injury as defined unambiguously in the statute must be an "accidental injury arising out of and in the course of employment" for the injury to be compensated. It is asserted that the presumption does not apply until evidence and facts are produced by a claimant to show that his disability is a result of an "accidental injury arising out of and in the course of employment," and is therefore related to his employment. If substantial evidence is produced by the employer controverting the claim, as was presented herein, then the burden of proof remains with the claimant. *Del Vecchio* v. *Bowers,* 296 U.S. 280 (1935).

The claimant is not foreclosed by the statute from presenting evidence of an accidental injury arising out of and in the course of employment, but such injury is not a presumed fact but one to be proven.

Petitioners suggest to this Court that contested "possibilities" concerning causal relationship not previously asserted or raised until raised by the lower court, or Respondent for the first time on appeal herein, should not entitle the Respondent to a new trial of his case. The findings of the Administrative Law Judge in this matter were supported by evidence and the presumption should not be used by the Court of Appeals to tip the scales in favor of compensation. The Administrative Law Judge was empowered to draw the inference, and his decision as to the weight of the evidence, with or without the presumption, should not be disturbed.

This statute was never intended to provide accident and health insurance for employees. If the opinion of the Court of Appeals is not reversed by this Court, every condition of health requiring medical treatment manifesting itself during non-working hours will result in a claim for workers' compensation benefits, which can only be rebutted, according to the D.C. Circuit opinions, by evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event," *Swinton* v. *J. Frank Kelly, Inc.*, 554 F.2d 1075, *cert. denied* 429 U.S. 820 (1976), or which shows that the "possibility was improbable." *Wheatley* v. *Adler,* 407 F.2d 307, 313 (1968). Petitioner submits to this Court that such an interpretation of the statutory presumption, if allowed to stand by this Court, will en-

courage the filing of frivolous and unmeritorious claims by employees against their employers, and make the employer's burden of defense a medical and factual impossibility.

Respectfully submitted,

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